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1 RECORD OF ORAL HEARING
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3 UNITED STATES PATENT AND TRADEMARK OFFICE
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6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
8
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10 *Ex parte* JULIEN T. NGUYEN
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13 Appeal 2009-005571
14 Application 10/764,835
15 Technology Center 2100
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18 Oral Hearing Held: April 13, 2010
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21 Before JOHN A. JEFFERY, THU A. DANG, and JAMES R. HUGHES,
22 *Administrative Patent Judges*.
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25 APPEARANCES:
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28 ON BEHALF OF THE APPELLANT:
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1 The above-entitled matter came on for hearing on Tuesday, April 13,
2 2010, commencing at 10:00 a.m., at the U.S. Patent and Trademark Office,
3 600 Dulany Street, Alexandria, Virginia, before Deborah Rinaldo, Notary
4 Public.

5 JUDGE JEFFERY: You have 20 minutes and you can start whenever you are
6 ready.

7 MR. GATTO: Good morning. My name is Jim Gatto of Pillsbury on behalf
8 of the Appellant.

9 I think there's one single issue which is dispositive of the entire Appeal. The
10 Examiner in alleging that the prior art discloses the features of claim 61, for
11 example, makes one critical error and that is in claim 61, one of the features is
12 that you detect whether there's a mnemonic name within a sequence of key
13 strokes, and if you find a mnemonic name in that sequence, you replace the
14 mnemonic name with a multimedia object.

15 So what's happening here is, as an example, if you write text as it says LOL,
16 which is an acronym for Laugh Out Loud, you'll actually put a little smiley
17 face in the text itself. That's what's meant by replacing the mnemonic name.

18 JUDGE JEFFERY: In the rejection, the Examiner is relying extensively on
19 the Skelly reference for this idea where you have a common chat environment
20 in figure 1, and as I understand it, the respective users or chatters in this
21 environment sort of have their associated characters that are displayed.

22 And as I understand your position, when users type in LOL or a smiley face,
23 whatever it happens to be, the text in the speech balloon is not replaced. It's
24 the actual image of the character that's replaced. It has nothing to do with the
25 text.

26 MR. GATTO: That's exactly right.

1 JUDGE JEFFERY: So if I'm a chatter in this environment and I type in LOL,
2 I'm still going to see LOL in the speech balloon.

3 MR. GATTO: Exactly. I think that really is the key issue and the Examiner
4 relies pretty much on column 1 of Skelly.

5 And I think one thing just to underscore what you correctly noted is that the
6 background -- column 1 talks about the background of the invention and it
7 talks about having a character and a text display and it says the character has
8 gestures and expressions.

9 And when you look at like around line 53 and on, it indicates that when you
10 find either a colon, dash, parentheses, which is a sequence for a smiley face or
11 down around line 60 or so if you find LOL, it clearly says what you do is you
12 then provide the expression, a smiley face expression for the character. So it's
13 not really being replaced. You are designating the expression for the
14 character.

15 So you are animating the character with a smiley face, but there is absolutely
16 no disclosure of modifying or replacing the text that you found that signals that
17 expression.

18 JUDGE JEFFERY: What do you make of the Examiner's finding on page 21
19 of the Answer where the Examiner seems to be saying, well, this is known in
20 the art, it's established that effectively replacing an emoticon, whatever you
21 want to call it, the smiley face with a corresponding object is known in the art,
22 and basically the Examiner provides that position. As I understand your
23 position, that's tantamount to official notice, is it not?

24 MR. GATTO: Well, the Examiner -- it's a couple different things. The
25 Examiner, I think, is saying it's shown and established in the art. I think it's
26 clear the Examiner hasn't shown this. The only reference he relies on is the

1 Skelly reference.

2 And to the extent that it's official notice, I believe it was challenged that we
3 didn't agree with that, that that is a well-known principle. And I think the fact
4 that the Examiner relies on Skelly and misinterprets or extends or modifies the
5 teaching of Skelly I think demonstrates that his example of why it's known in
6 the art really is not supported.

7 So we would argue that's just an unsupported statement by the Examiner.

8 JUDGE JEFFERY: When challenged, the Examiner is going to have to
9 provide some sort of evidence on this record. It seems to me to show that
10 concept was known not just at the time this particular case was filed, which is
11 a continuation of another case.

12 As I understand it, the effective filing date is April 1, 1998 in this case. So the
13 burden on the Examiner here is to show that concept was known as of April 1,
14 1998, I would think.

15 MR. GATTO: That would be correct, if those are the correct dates, yes. I
16 think that that issue is dispositive because that feature shows up in each of the
17 independent claims.

18 There's really only one other issue. I won't reiterate all the arguments in the
19 Brief. I think there are separate arguments for many of the dependent claims
20 but I think the Examiner also fails to establish in claim 61 and the other claims
21 that there is a set of multimedia objects that are associated with an ensemble
22 where the ensemble has a set of ensemble properties.

23 Here the Examiner doesn't really point to anything in Skelly that suggests that
24 there is really an ensemble. It's just that there's different characters or
25 expressions and the way ensemble is used in the specification, it indicates --

1 well, in the claim, first of all, it's a set of objects within the ensemble and then
2 that set has a set of properties.

3 So for example, in claim 63 it indicates that the ensemble properties include a
4 theme. So you've got this concept of ensemble that really is not even disclosed
5 in Skelly either.

6 JUDGE JEFFERY: Didn't the Examiner rely on Liles for that, though?

7 MR. GATTO: With respect to claim 63 he did. If you look at Liles, though,
8 there's really nothing in Liles that discloses that either.

9 Liles is also a graphical chat type of system and there's nothing that suggests --
10 from the one place that the Examiner points to in Liles, it really doesn't
11 disclose an ensemble which is a set of multimedia objects having properties
12 such as a theme.

13 JUDGE JEFFERY: Well, I wanted to ask you about that because I go to
14 figure 3 of Liles and the Examiner sort of touches on this feature of Liles
15 where you have got -- it's a chat environment and the users can actually pick
16 the characters that they want to, their avatars to be, if you will.

17 From what I see in figure 3, it looks like you've got a list of directories there.
18 One is entitled "Fish Bowl" and underneath that you've got a number of
19 different types of things that correspond to the "fish bowl" of characters, if you
20 will. And then you have "Common" as another directory item. And then
21 underneath that you've got a number of different avatars associated with a
22 common, dare I say, "theme."

23 And you can preview the respective characters by selecting one. And the one
24 you see in figure 3, as I understand it, is the so-called "Sophisticate Avatar."

25 Now, what I wanted to ask you is, why is this not representative of an

1 ensemble and why is this not representative of a theme? Because it seems to
2 me that the “Fish Bowl” and the “Common” designation seem to provide an
3 indication of a particular common thread of a common idea among the various
4 avatars in that hierarchy.

5 MR. GATTO: I think with respect to Liles, there's really no disclosure that
6 there's a theme there. I think what there is, is that there is categories, perhaps,
7 but I think that's different than a theme.

8 JUDGE JEFFERY: A category is not a theme?

9 MR. GATTO: I think there's a difference. You could have a category of
10 classification of rocks. I think that's different than what a theme would be.
11 There's different examples of what themes could be. You could have daytime,
12 nighttime, kind of settings. Those types of things could create a theme.
13 A hierarchal classification, I think, is different than a theme. There's nothing
14 in the reference itself to suggest that it is a theme. It is, as you, I think,
15 indicated correctly, more just a classification or a grouping.
16 But it doesn't -- it leaves open too what is the set of properties because the
17 claim, for example, claim 63 or claim 61, rather, refers to the ensemble having
18 a set of properties and then 63 further adds that the properties include a theme.
19 So it's not clear just based on a categorization how that constitutes a set of
20 properties and a theme.

21 JUDGE JEFFERY: Well, I look at figure 3, I don't want to belabor this point
22 but just to sort of jump in here, looking at figure 3, the various categories, Fish
23 Bowl and Common, seem to have some sort of common aspect to them, if you
24 will, and that when you select one of these things, you are actually seeing the
25 corresponding image there.

1 Maybe the image is one of the properties that you would see, it's actually
2 visual representation, among other things. The very title of the avatar itself
3 could be argued to be a property.

4 But it looks like below that in figures 4A through 4C, each one of these avatars
5 has an associated gesture, if you will. In 4A you've got the avatar looking at a
6 watch, you've got the one right next to it where he's waving and so on and so
7 forth. So I think I'm having a hard time seeing why those aren't properties
8 associated with an ensemble here.

9 But in any event, I know time is limited here, so I wanted to ask you another
10 question here about claim 64. Claim 64 calls for the ensemble properties to be
11 editable in response to a set of editing abbreviations.

12 As I understand the Examiner's position, the Examiner seems to be taking the
13 position that if I can edit these respective avatar images through use of a paint
14 program, that would be in column 7, around line 50, 51, in that area; and as I
15 understand your position, you are basically saying, well, a paint program is --
16 and this will be on page 20 of the brief. A paint program is not editing
17 abbreviations. You are not able to edit in response to an editing abbreviation.
18 My question to you is, why? A typical paint program on a computer, it seems
19 to me, to invoke the very program, you would have to double click on the icon,
20 say like Adobe Photo Shop or Paint Shop, any of these standard editing
21 programs and would that not be a so-called "editing abbreviation," just the
22 very -- the very commands within the paint program itself? Why is that not an
23 editing abbreviation?

24 MR. GATTO: Because the specification, for example, at page 7 makes it clear
25 that each abbreviation is a sequence of a selected sequence of key strokes or
26 mouse actions.

1 And the paint program you have to basically invoke the program and I don't
2 think that there's really a set of abbreviations. It's free form. There's a lot of
3 different things you can do with a paint program to change a bitmap image.
4 It's not -- it's a much simpler approach with what's set forth in the invention
5 here with respect to kind of a text-based abbreviation which then gets
6 translated into an editing, if you will, of the multimedia object.

7 JUDGE JEFFERY: Sure. What about a set of shortcut keys on a keyboard
8 where I invoke a paint program by hitting shift P, let's say, just a combination
9 of characters as is well known? You can launch many things using keystrokes
10 or certain mouse commands.

11 My only point being, it struck me that the term "editing abbreviations" -- I
12 understand your position, but it struck me as being a somewhat broad
13 representation, particularly when you compare claim 65 which further limits
14 what an editing abbreviation is and basically says it's a relatively short
15 sequence of key strokes and mouse actions and nothing more.

16 So I bring this up because it struck me as being a somewhat broad recitation.

17 MR. GATTO: I understand what you are saying but I think if you look at the
18 claims as a whole, we're talking about that there's mnemonic names present in
19 a key stroke and you are replacing multimedia objects which are an ensemble
20 having properties.

21 And when you look at claim 64, it's the ensemble properties that are editable.
22 It's different than even just editing a bitmap as far as what's specifically
23 claimed.

24 So even without agreeing but assuming you could argue that those key strokes

1 in a paint program were an abbreviation, it's still what's being changed there is
2 not the properties of an ensemble. You are actually changing the image or the
3 representation of the character in that case.

4 So even then --

5 JUDGE JEFFERY: That's not an ensemble property, the image itself?

6 MR. GATTO: Correct. So I think for at least that reason it would still be
7 different even if it was deemed to be an abbreviation. But we don't agree that
8 that's an abbreviation as it's used in the current application as well.

9 Unless you have any other questions, I think those were the key points we
10 wanted to highlight.

11 JUDGE JEFFERY: I think that will do it, counsel. Thank you very much.

12 Whereupon, the proceedings at 10:14 a.m., were concluded.

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